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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

SCHNEIDER NATIONAL CARRIERS, INC.
AND HENRY LAVERNE WUBBEN,

Petitioners,

vs.

RICHARD PYATT AND DIANA PYATT,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

1. Does federal common law or state common law determine the standard of review of the legal sufficiency of the evidence to submit a negligence claim to a jury in a diversity action which was tried under Illinois law? Since this is a direct conflict among the several Circuit Courts of Appeal this question should be resolved.

2. Was plaintiff's evidence sufficient under Illinois law to submit his negligence claim to the jury in the absence of medical testimony that plaintiff's neck injury (an annular tear of the cervical spine) was caused by the rear-end collision with the appellants' tractor-trailer?

II. LIST OF PARTIES

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Schneider National Carriers, Inc. and Henry Laverne Wubben, pray that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Seventh Circuit entered August 12, 1996, denying their petition for rehearing and suggestions for rehearing *en banc* thereby affirming the Judgment of the United States District Court which was entered on the basis of a jury verdict in this diversity personal injury case, and that on hearing the Judgment be reversed or, in the alternative, the case remanded to the District Court for further proceedings under applicable Illinois law.

V. OPINIONS BELOW

The Opinion of the Court of Appeals is not reported under the provisions of Seventh Circuit Rule 53. It is reprinted in its entirety in the appendix to this petition (App. 1-10).

The Judgment and Order of the United States District Court for the Southern District of Illinois are not reported. Copies of the Judgment and Order are also set forth in their entirety in the appendix (App. 12-18, 19).

VI. JURISDICTIONAL STATEMENT

The Opinion of the Court of Appeals was entered on July 15, 1996 (App. 1). A timely petition for rehearing and suggestions for rehearing *en banc* was filed and was denied on August 12, 1996 (App. 11). This Court has

jurisdiction under the provisions of 28 U.S.C. § 1254(1) (1996). Jurisdiction in this action was based on diversity of citizenship under the provisions of 28 U.S.C. § 1332 (1996) and removal jurisdiction under 28 U.S.C. § 1441 (1996) (App. 36-39).

VII. FEDERAL RULES AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1652 (1996) states:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Fed. R. Evid. 703 states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Fed. R. Evid. 705 states:

> The expert may testify in terms of opinions or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in

any event be required to disclose the underlying facts or data on cross-examination.

VIII. STATEMENT OF THE CASE

Diane Pyatt and her husband Richard Pyatt were returning to St. Louis, Missouri on the evening of January 25, 1991, from Steelville, Illinois (Tr. pp. 2, 24). At the time of the accident, Mr. Pyatt was 21 years of age (Tr. p. 112). When the couple left Steelville, it was raining and starting to sleet (Tr. p. 25). As they approached the Poplar Street Bridge which spans the Mississippi River on Highway 64/55, it was icy and slippery (Tr. p. 3, 102). Mrs. Pyatt noticed that the roads were starting to get a little slicker (Tr. p. 104).

Mrs. Pyatt drove west on a two lane wide ramp to the bridge at a speed of 45-55 mph (Tr. pp. 4, 26, 103). It was nighttime (Tr. p. 103). In the left lane, a blue Escort, later identified as Elizabeth Petrovics' car, moved ahead of the Pyatt car and attempted to pass (Tr. pp. 4, 27, 104). The blue Escort lost control on the ramp, slid in front of the Pyatts' car against the concrete barrier (hitting the guardrail) and came to rest in front of the Pyatts' car (Tr. pp. 4, 5, 27, 104). Mrs. Pyatt applied her brakes and made contact with the rear of Mrs. Petrovics' automobile (Tr. pp. 4, 5, 27, 104). The Pyatt car was going 35-40 mph when it slid into and bumped the rear of Mrs. Petrovics' car (Tr. p. 104). Following this collision, Elizabeth Petrovics walked back to speak to Mr. Pyatt (Tr. pp. 5, 28, 105). After a brief talk concerning the condition of the persons in the cars, they decided to drive on (Tr. pp. 5, 28,

105). There were no apparent injuries (Tr. p. 105). Mrs. Petrovics and Mrs. Pyatt started to drive forward (Tr. pp. 5, 28, 105). The ice on the bridge made traction difficult, but Mrs. Pyatt was moving when a white pickup truck sideswiped her car knocking off the driver's side rear-view mirror (Tr. pp. 5, 28, 106).

A few seconds after the white pickup truck hit the Pyatt car, the Pyatts' Chevrolet was rear-ended as it was pulling away again by a Schneider tractor-trailer (Tr. pp. 5, 29, 30, 31, 106, 135). The orange Schneider truck was loaded with empty bottles (Tr. p. 136). It had been driven that day from Beloit, Wisconsin by Wubban, an agent and driver for Schneider (Tr. p. 135). The tractor-trailer and bottles weighed approximately 58,000 pounds (Tr. p. 136). Mrs. Pyatt heard the truck sound its horn before the crash (Tr. p. 106). The force of the collision caused the Pyatt car to turn clockwise 360 degrees (Tr. pp. 5, 6, 31, 32, 33, 106, 107). As the car was pushed forward, turning to the right, it was hit again by the truck (Tr. pp. 5, 31). While spinning, it was hit a third time by the truck which came to rest about 100 feet in front of the Pyatt car (Tr. pp. 5, 31, 33, 107). Mr. Wubben talked to Mr. Pyatt after the accident and said he was trying to do everything he could to stop (Tr. p. 35).

Mr. Pyatt went to Jewish Hospital with his wife, but he was not examined (Tr. pp. 7, 39). He went to the hospital because Mrs. Pyatt was complaining that her back and neck were hurt (Tr. p. 39). After Mrs. Pyatt was examined, the couple went home (Tr. p. 39). Mr. Pyatt believed everything would return to normal (Tr. p. 39). The following morning Mr. Pyatt tried to get out of bed, but he could not move his neck and shoulders (Tr. pp. 7,

39). Three days later, he went to the Jewish Hospital Emergency Room for an examination complaining of back and neck problems (Tr. p. 401). The cervical spine x-rays taken at the hospital were normal (Tr. pp. 214, 220).

Dr. Benjamin A. Borowski saw Mr. Pyatt at Jewish Hospital several times (Tr. pp. 7, 40, 41). Dr. Borowski recommended physical therapy and Mr. Pyatt was off work for three months (Tr. pp. 41, 42). On March 13, 1991, Dr. Borowski's medical notes state that Mr. Pyatt's "neck/shoulder pain was gone" (Tr. pp. 182, 220, 274). On May 8, 1991, Dr. Borowski recommended that Mr. Pyatt return to work at Crestwood Plaza (Tr. pp. 7, 43). While at work, Mr. Pyatt draped a three inch fire hose over his shoulders to control the hose because of its weight (Tr. pp. 8, 43). While doing this work and pulling on this hose, he injured himself (Tr. pp. 8, 43, 85-87). Crestwood Mall placed Mr. Pyatt on light duties for two or three weeks (Tr. p. 43). Mr. and Mrs. Pyatt decided to move from the St. Louis area to Grand Tower, Illinois, a community with 850 people (Tr. pp. 8, 45, 46, 113, 121, 122). After moving to Grand Tower, Illinois, Mr. Pyatt continued to experience pain and discomfort (Tr. pp. 48-54).

In October of 1991, Mr. Pyatt went back to St. Louis for an examination by an orthopedic specialist, Dr. George Schoedinger, III (Tr. pp. 9, 49). Dr. Schoedinger saw Mr. Pyatt on October 21, 1991 (Tr. p. 49; Ex. 1, 2, 3). The examination was normal, including x-rays, except that Mr. Pyatt had "decreased motion in lateral bending" at the farthest end of lateral bending (Tr. pp. 181-195). Dr. Schoedinger's deposition testimony was read to the jury

(Tr. pp. 181-218). Dr. Schoedinger did not review or examine the Jewish Hospital Emergency Room records, the hospital x-rays or Dr. Borowski's records (Tr. p. 197).

Dr. George Schoedinger, III by Mrs. Toft:

* * *

Q: All right. Did you take a series of x-rays of Mr. Pyatt when you examined him?

A: Yes. X-rays of his neck and of his dorsal spine were obtained on that date (i.e., 10/21/91), and they were normal (Tr. p. 185; date added).

* * *

Q: Is your diagnosis of a tear of the – of – the – annular tear of the cervical spine? Is that the result of – of your noticing something from your examination that helped you draw that conclusion?

A: No. There was nothing. His examination was entirely normal with the exception of decreased motion in the lateral bending and production of pain which was reported at the extreme of motion. But since we know that he has no evidence of fracture, the only reasonable conclusion is that he has sustained an injury to the outer covering of the intervertebral disk since the other diagnoses just really aren't possible (Tr. p. 187).

* * *

Dr. George Schoedinger, III by Mrs. Toft:

* * *

Q. What other information would you need in order to determine if, in fact, he was seriously or permanently injured in this accident?

A. Well, we have a history that suggests that he was in an automobile accident. But I guess the point to be made is that by examining the patient we are not able to do anything other than to state that something has happened. His history places that occurrence chronologically in relation to an accident.

Q. Did he tell you anything about how severe this accident was?

A. I have no knowledge of that.

Q. Can you tell us, Doctor, what he told you about the type of impact that occurred on January 25, 1991?

A. That's noted in the first paragraph of that report that he was driving a vehicle and was – was – I am sorry – was a passenger in a vehicle driven by another party and was stopped in traffic, and that the impact occurred from the rear of the vehicle. I have no other knowledge than that.

Q. He didn't tell you that it was a semi tractor-trailer that hit him?

A. He may have. I did not record that.

Q. Okay. Doctor, based upon the history that Mr. Pyatt gave you and your physical examination of him, the x-rays that you had taken, did you reach an opinion, a diagnosis, based upon a

> reasonable degree of medical certainty, as to what Mr. Pyatt suffered as a result of the accident of January 25, 1991?
>
> A. Yes. I thought he had an annular tear in the cervical spine (Tr. pp. 200-201).
>
> * * *

Dr. Schoedinger also saw Mr. Pyatt on March 1, 1994, shortly before the trial (Tr. p. 180). In this report (App. p. 47), Dr. Schoeodinger noted that the range of motion of Mr. Pyatt's neck was "decreased markedly in all planes" (Tr. p. 188). His supplemental report recommended that Mr. Pyatt return to work (Tr. p. 40). The 1994 MRI examination of Mr. Pyatt's neck was normal (Tr. pp. 191, 207). Dr. Edwin L. Carter was called to testify by Schneider National Carriers, Inc. in defendants' case (Tr. pp. 262-285). Dr. Carter's May 4,1995, examination found that Mr. Pyatt was a healthy man with a 50% subjective neck limitation (Tr. p. 271). Dr. Carter did not believe that Mr. Pyatt had an annular tear of the cervical spine (Tr. pp. 272-273).

Plaintiffs submitted their case of negligence against Defendant Elizabeth Petrovics and Defendants Henry LaVerne Wubben and Schneider National Carriers, Inc. on the theory that Defendant Petrovics caused the accident and related injuries to the Plaintiffs because of her improper passing, or that Defendant Wubben, Schneider's driver, drove his tractor-trailer at a rate of speed which was not safe for the traffic conditions and the weather and he failed to decrease his speed in order to avoid colliding with Plaintiffs' car which was stopped on the bridge. Illinois Pattern Instruction No. 20.01 (App.

27). The jury rejected the negligence claims against Defendant Petrovics and Mrs. Pyatt's consortium claims against the Defendants (App. 19). The jury found in favor of Plaintiff Richard Pyatt and against Schneider National Carriers, Inc. on Richard Pyatt's claim that Schneider National's driver was negligent (App. 19). The jury verdict was in favor of Richard Pyatt and against Schneider National Carries, Inc. for $141,892.92, which included $50,000.00 for pain and suffering, $50,000.00 for the permanent disability relating to his neck, $38,917.60 for lost wages and $2,975.32 for medical expenses (App. 20). Mr. Pyatt's lost wage claim prior to his voluntary resignation from Crestwood Plaza was $3,017.00 (Tr. p. 366).

IX. REASONS FOR GRANTING THE WRIT

In their motion for judgment notwithstanding the verdict, Petitioners argued that state law applied in this case to determine the legal sufficiency of the evidence to submit the case to the jury and to sustain the verdict. This state standard provides in part that such motions should be denied unless the evidence overwhelmingly favors movant and no contrary verdict could stand. *Pedrick v. Peoria & E. R.R.*, 37 Ill.2d 494, 229 N.E.2d 504 (1967). See, *Polkey v. Phillips*, 86 Ill. App. 3d 677, 408 N.E.2d 348 (1st Dist. 1980). See also, *Oberman v. Dun & Bradstreet, Inc.*, 507 F.2d 349 (7th Cir. 1974).

This issue was again raised in the Seventh Circuit Court of Appeals, but the panel of the Seventh Circuit declined to reconsider the "federal reasonable man" standard of review (i.e., "whether reasonable minds could

deem the evidence adequate under the governing [state] substantive rule") because the " . . . rationale elaborated in *Mayer* for applying federal instead of state standards to motions for judgment (App. 4) as a matter of law as well as to motions for summary judgment (App. 4) is compelling and now the settled law of this circuit". *Mayer v. Gary Partners & Co.*, 29 F.3d 330 (7th Cir. 1994), *Roboserve v. Kato Kagaku Co.*, 78 F.3d 266 (7th Cir. 1996).

In the Seventh Circuit, Judge Posner has determined that one standard of review is desirable at all stages of the proceeding. *Mayer v. Gary Partners and Co., Ltd.*, 29 F.3d 330 (7th Cir. 1994). But the United States Supreme Court, in a unanimous opinion by Justice Scalia, has stated, "There is no federal general common law, *Erie R. Co. v. Thompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) . . . " *O'Melveny & Meyers v. F.D.I.C.*, 512 U.S. ___, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994). In *O'Melveny* this Court directed the Ninth Circuit to follow state law on the issue of a corporate director's imputed knowledge of fraud. See, *F.D.I.C. v. O'Melveny & Meyers*, 61 F.3d 17 (9th Cir. 1995). Accordingly, the District Court and the Seventh Circuit in this case should have examined applicable state law to determine if there was sufficient evidence of causation to submit this negligence action to a jury.

The controversy concerning whether evidence is sufficient to submit a question of fact to a jury or to support a verdict arises from the decision of this Court in *Erie R. Co. v. Tompkins*, 364 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) that the district courts, in cases where their jurisdiction arises from diversity of citizenship are bound to apply the substantive law of the state in which they are

sitting. See, 10 A.L.R. Fed. 451 (1972) Sufficiency of Evidence As Question of Federal or State Law In Diversity Action. In this case the magistrate, Judge Clifford J. Proud, refused to consider or apply state law with respect to the legal sufficiency of the evidence (App. 7-12).

This Court has not yet finally resolved the question whether the sufficiency of the evidence is a matter of procedure controlled by federal law or a matter of substance falling within the *Erie Doctrine* and applicable state law. *Hanna v. Plumer,* 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965); *Dick v. New York Life Ins. Co.,* 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959) and *Mercer v. Theriot,* 377 U.S. 152, 84 S.Ct. 1157, 12 L.Ed.2d 206 (1964). Divergent lines of authority have arisen on this issue among and even within some circuits. See, Childress, *Judicial Review and Diversity Jurisdiction; Solving an Irrepressible Erie Mystery?* 47 SMU L.Rev. 295-308 (1994). Compare *Dawson v. Wal-Mart Stores, Inc.,* 978 F.2d 205 (5th Cir. 1992); *Bankers Trust Co. v. Lee Keeling & Associates, Inc.,* 20 F.3d 1092 (10th Cir. 1994); *Federal Kemper Life Assur. Co. v. First Nat. Bank of Birmingham,* 712 F.2d 459 (11th Cir. 1983) which apply federal standards with *Moskowitz v. Pearisico,* 458 F.2d 240 (6th Cir. 1972) and *Adams v. Fugua Industries, Inc.,* 820 F.2d 271 (8th Cir. 1987) and *Mehra v. Bentz,* 529 F.2d 1137 (2d Cir. 1975) which apply state standards. Some circuits appears to have even applied both standards. See, *Reynolds v. Pegler,* 223 F.2d 429 (2d Cir. 1955), *cert. den.,* 350 U.S. 846, 76 S.Ct. 80, 100 L.Ed. 754 (1955); *Calveri v. Katy Taxi, Inc.,* 413 F.2d 841 (2d Cir. 1969); *Walsh v. Miehle-Gross-Dexter, Inc.,* 378 F.2d 409 (3d Cir. 1967); *Waldron v. Aetna Cas. & Sur. Co.,* 141 F.2d 230 (3d Cir. 1944); *Jones v. Meat Packers Equipment Co.,* 723

F.2d 370 (4th Cir. 1983); and *Hottle v. Beech Aircraft Corp.*, 47 F.3d 106 (4th Cir. 1995). The standard of review should not be a matter of election by the circuit courts of appeal. This case was filed in an Illinois Circuit Court, and after removal, was tried before a jury under Illinois common law. Federal substantive law was not even implicated. Therefore, review of the sufficiency of evidence should also be governed by Illinois cases and authorities.

The District Court acknowledged that, even under the federal "reasonable man standard", there must be probative evidence of causation to support Richard Pyatt's claim that he sustained permanent neck injury as a direct result of Defendants' negligence (App. 15). Judge Proud referred specifically to Dr. Schoedinger's statement that Mr. Pyatt suffered an annular tear of the cervical spine (App. 15, 16). The District Court then adds the conclusion: "Clearly, Dr. Schoedinger testified that the January, 1991, accident caused Mr. Pyatt to sustain an injury." (App. 16). This interpretation of the doctor's answer is not supported by the record and, even if the answer is implied, it would not be sufficient under Illinois authorities to support a verdict against Schneider National and Wubben. *Boose v. Digate*, 107 Ill. App. 2d 418, 246 N.E.2d 50 (3d Dist. 1969); *Sanitary Dist. of Chicago v. Industrial Commission*, 343 Ill. 236, 175 N.E. 372 (1931).

Proof of causal connection between the accident and the injury is required under Illinois law for a submissible negligence action. See, *Abrams v. City of Mattoon*, 148 Ill. App. 3d 657, 499 N.E.2d 147 (4th Dist. 1986); *Scholle v. Continental Nat. American Group*, 44 Ill. App. 3d 716, 358 N.E.2d 893 (2d Dist. 1976). See for example the following

Illinois cases which required evidence of causation: *Sourian v. Jones*, 350 Ill. App. 365, 112 N.E.2d 920 (1st Dist. 1953) (Dr. Govostic was asked, "Whether the trauma or violence . . . was sufficient to cause the promotion of this melanosarcoma?"); *Healy v. Nordhous*, 40 Ill. App. 2d 320, 188 N.E.2d 227 (1st Dist. 1963) ("Doctor, do you have an opinion, based upon a reasonable degree of medical certainty, as to whether or not there could be a causal connection between the condition that you have described with reference to Mr. Healy, that is, the whiplash injury of the neck and the headaches and trauma occurring on February 15, 1961?"); and *O'Keefe v. Lithocolor Press, Inc.*, 40 Ill. App. 2d 123, 199 N.E.2d 60 (5th Dist. 1964) (Whether the doctor would "have an opinion as to whether or not the condition of ill being described in the hypothetical question might or could be causally related to the incident of trauma or injury of October 3, 1958?").

Under Illinois law, Dr. Schoedinger's opinions relating to Mr. Pyatt's injuries were admissible. *Wilson v. Clark*, 84 Ill.2d 186, 417 N.E.2d 1322 (1981). Because the Illinois Supreme Court has adopted Federal Rules 703 and 705, the facts or data upon which an expert bases an opinion need not be admissible in evidence "if of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Therefore, it was unnecessary to present Dr. Schoedinger's opinions in the form of hypothetical questions. It was also permissible for Dr. Schoedinger, a non-treating physician, to render opinions based upon the subjective complaints of Mr. Pyatt without any objection that his opinion was based upon impermissible hearsay. *Melecosky*

v. McCarthy Bros. Co., 115 Ill.2d 209, 503 N.E.2d 355 (1986). An expert's opinion is, of course, only as valid as the basis and reasons for the opinion. *McCormick by McCormick v. Maplehurst Winter Sports, Ltd.*, 116 Ill. App. 3d 93,519 N.E.2d 469 (2d Dist. 1988). When there is no factual support for an expert's conclusions, the conclusions alone do not create an issue of fact. *Wells v. Great Atlantic Pacific Tea Co.*, 171 Ill. App. 3d 1012, 525 N.E.2d 1127 (1988). It is permissible for an expert to testify concerning his opinions in terms of possibilities and probabilities (*Nicholas v. City of Alton*, 107 Ill. App. 3d 404, 437 N.E.2d 757 (5th Dist. 1982); *Presswood v. Morris*, 70 Ill. App. 3d 513, 388 N.E.2d 844 (5th Dist. 1979)], but the opinion must be based upon a reasonable degree of medical certainty. *Collins by Collins v. Straka*, 164 Ill. App. 3d 355, 517 N.E.2d 1147 (2d Dist. 1987). But the expert may not guess, surmise or conjecture as to a possible cause for an injury based on matters which could not be shown to have existed. *Kanne v. Metropolitan Lie Ins. Co.*, 310 Ill. App. 524, 34 N.E.2d 732 (1st Dist. 1941).

In this case, Richard Pyatt's unusual injury (an annular tear of the cervical spine) was neither obvious nor directly linked to the collisions between the truck and the plaintiff's car. Mr. Pyatt had no symptoms of injury at the time of the accident (Tr. p. 39). He refused medical attention that evening; (Tr. p. 111) he went to the hospital three days later for the first time; (Tr. pp. 84, 134) the x-rays normal; (Tr. p. 192) and the 1994 MRI was also normal (Tr. pp. 191, 207). His treating physician, Dr. Borowski, did not testify, but the records from this doctor indicated that his pain had gone away completely after three months (Tr. p. 274). Mr. Pyatt admitted he injured his back at

work and that he had a prior back injury (Tr. pp. 306-307). None of these facts were apparently evaluated by Dr. Schoedinger. Dr. Schoedinger merely confirmed what was never disputed, that Mr. Pyatt had a diagnosed neck injury nine months after the accident which the doctor believed was permanent (Tr. p. 207). Dr. Schoedinger did not make the necessary causal connection between the injury and the collision with Defendants' truck.

In the absence of probative evidence on causation, Plaintiff did not sustain his burden of proof that his neck injury was caused by Defendants' negligence. Consequently, the verdict was not supported by the evidence under Illinois substantive law and, therefore, the judgment should be reversed or the case remanded for further proceedings under the applicable legal standard of review.

X. CONCLUSION

Because the District Court and the Seventh Circuit Court of Appeals applied an incorrect standard of review, the judgment should be reversed and case remanded with directions to the District Court to apply applicable Illinois common law to determine the legal sufficiency of the evidence to submit this case to a jury.

Respectfully submitted,

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Attorneys for Petitioners
Schneider National Carriers, Inc.
and Henry Laverne Wubben

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued April 12, 1996

July 15, 1996

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53

Before

Hon. Walter J. Cummings, *Circuit Judge*

Hon. John L. Coffey, *Circuit Judge*

Hon. Daniel A. Manion, *Circuit Judge*

RICHARD PYATT and
DIANE PYATT,

Plaintiffs-Appellees,

No. 95-2779

v.

SCHNEIDER NATIONAL
CARRIERS,
INCORPORATED and
HENRY L. WUBBEN,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Illinois

No. 93 C 302

Clifford J. Proud,
Magistrate Judge.

ORDER

I.

On the evening of January 25, 1991, Diane Pyatt was driving her 1980 Chevrolet Citation over an icy bridge when a car attempting to pass slid into a guard rail and

then into her path, causing a minor rear-end collision. Neither Diane nor her passenger, husband Richard Pyatt, nor the driver of the other car, Elizabeth Petrovics, was injured. After the drivers talked things over, the Pyatts reentered the icy road only to be sideswiped by a white pickup truck, which knocked off the driver's side mirror. Soon after, a tractor-trailer truck driven by Henry Wubben for Schneider National Carriers, Inc. ("Schneider") rear-ended the Pyatt car, spinning it 360 degrees. Unable to stop because of the ice, the Schneider truck struck the Pyatt car twice more as it spun forward. At trial, the jury heard a statement by Wubben that "if I knew it was [as] slippery as it was, why, I probably wouldn't have been driving as fast. I didn't realize it was as slippery as it was."

Concerned about Diane's back, which had given her troubles before, that night the Pyatts went to the hospital. Diane was examined for back injuries and released; Richard was not examined, believing he was fine. However, the next morning Richard couldn't move his neck and shoulders. An x-ray of Richard's spine taken three days later did not reveal anything out of the ordinary, but the physician who examined him, Dr. Benjamin Borowski, recommended physical therapy.

For about the next three months, Richard did not work. Dr. Borowski's medical notes from March 13, 1991 indicate that Richard's "neck/shoulder pain was gone." On May 8, 1991, Dr. Borowski recommended that Richard return to work, which he did, but he later injured his back (or aggravated the previous injury) while using a heavy fire hose to hose down a parking garage. Because Diane was unable to work and Richard anticipated losing

his employment due to his neck problems, Richard quit his job and the couple moved to the Grand Tower, Illinois area, population 850. Although Diane worked as a home care-giver, Richard Pyatt was unable to find steady work there for three years. One of the reasons was his bad vision which prevents him from working late in the afternoon and at night. He also claims that when he told employers about his neck problems, no one wanted to hire him.

About nine months after the accident, on October 21, 1991, Richard was examined by Dr. George Schoedinger, an orthopedic surgeon specializing in the treatment of the neck and spine. Richard gave Dr. Schoedinger an account of the accident on January 25, 1991. He explained that his car was stopped on a bridge when the Schneider truck first hit his car from behind and that as a result his head struck the side of the car. Richard told Dr. Schoedinger that initially he experienced none of his current symptoms, but that later he had neck and interscapular pain as well as pain about his right upper arm. He then spoke of his past evaluation and subsequent physical therapy and of his present neck pain which he described as intermittent and aggravated by daily activities such as lifting, turning his head, and driving. He also described an occasional feeling of tingling about his fingers and stiffness about his right hand. Upon examination, Dr. Schoedinger noted that Richard had scoliosis (curvature of the spine) and decreased range of motion on both sides in lateral bending and that right lateral bending produced posterior neck pain in the midline. X-rays of Richard's neck and dorsal spine were normal, with the exception of some scoliosis. Based on his examination and the information

Richard had provided, Dr. Schoedinger concluded to a reasonable degree of medical certainty that Richard suffered from an annular tear in the cervical area as a result of the January 21, 1991 accident.

Dr. Schoedinger saw Richard again on March 1, 1994 (shortly before the trial) and noted that his range of neck motion had "decreased markedly." He also diagnosed "splinting," or muscle spasm, a phenomenon where the body attempts to splint the injured portion of the body by making it immobile. Dr. Schoedinger attributed the loss of neck movement to a derangement of the neck's mechanical systems or to a muscle spasm in the neck's anterior. It was his opinion that the loss of neck motion was probably permanent since physical therapy had failed and since the neck was still a problem three years after the accident. In another examination in 1995, defendant's medical expert, Dr. Edwin Carter, likewise found a significant loss of neck movement, though he disagreed with Dr. Schoedinger's diagnosis that Richard had an annular tear of the cervical spine. Dr. Schoedinger admitted at deposition that typically an annular tear would take six weeks to three months to heal.

The Pyatts sued Elizabeth Petrovics, the driver of the other car in the first collision, Henry Wubben, driver of the Schneider truck, and Schneider for negligence. Richard claimed $3,020 in lost wages as a direct result of the accident, $38,900 for three years of looking for a job with a bad neck, $2,975.32 in medical bills, plus some additional miscellaneous costs. Diane claimed loss of consortium. The jury completely exonerated Ms. Petrovics and rejected Diane's consortium claim, but found in favor of Richard in his claims against Wubben and Schneider. The

award totaled $141,892.92: $50,000 for pain and suffering; $50,000 for permanent disability; $38,917.60 for lost wages; and $2,975.32 for medical expenses. Defendants' motion for judgment as a matter of law was denied. Defendants appeal.

II.

Defendants raise three issues on appeal: (1) whether the district court properly applied the federal as opposed to state standard in evaluating defendants' post-trial motion for judgment as a matter of law; (2) whether the evidence was sufficient to support the jury's verdict; and (3) whether there was a reasonable basis for the damages assessed. We address each of these issues in turn.

A.

Mayer v. Gary Partners & Co., 29 F.3d 330, 334-35 (7th Cir. 1994), holds that the standard in federal court for judgment as a matter of law is a federal not state standard, namely, "whether reasonable minds could deem the evidence adequate under the governing [state] substantive rule." We decline the defendants' invitation to revisit this holding. The rationale elaborated in *Mayer* for applying federal instead of state standards to motions for judgment as a matter of law as well as to motions for summary judgment is compelling and now the settled law of this circuit. *Id.* at 334; *see, e.g., Roboserve v. Kato Kagaku Co.*, 78 F.3d 266, 275 (7th Cir. 1996) (federal standard controls, citing *Mayer*). Nothing in this case suggests the issue should be reopened after it was firmly resolved in *Mayer*.

B.

Defendants argue that the evidence was insufficient to support the jury's finding of negligence, or in other words, that the district court erred in denying their motion for judgment as a matter of law. We disagree. "The elements necessary of proof in a negligence action are duty, breach, injury and causation." *Lee v. Chicago Transit Authority*, 605 N.E.2d 493, 505 (Ill. 1992). Or more precisely: "the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately resulting from that breach." *Arroyo v. Chicago Transit Authority*, 643 N.E.2d 1322, 1328 (Ill. App. Ct. 1994). There is no question that Wubben, the driver of the Schneider truck, owed Richard, the passenger of another vehicle on the same public road, a duty of reasonable care at the time of the accident; defendants do not deny this. Moreover, Wubben admitted that had he known the road was so slippery, he would have slowed down. Given that admission and the details of the accident presented at trial, the jury could reasonably have concluded that Wubben should have been aware of the slippery road conditions and slowed down, and that his failure to do so was a breach of his duty of reasonable care to the Pyatts.

Therefore, the decisive question is whether there was sufficient evidence of an injury proximately caused by Wubben's negligence. We have an injury: Richard undoubtedly has neck problems; even Dr. Carter, defendants' expert witness, agreed with that. But is there sufficient evidence for a jury to reasonably conclude that at least some of those problems were caused or aggravated by the Schneider-Pyatt accident? We believe there is. Wubben's negligence resulted in his tractor-trailer truck

slamming into the Pyatt's small car three times. The force of one impact spun the car around 360 degrees. Any reasonable trier of fact would view these events as having created the potential for serious injury or death. Though not seriously injured, almost immediately Richard experienced neck and shoulder stiffness and pain, for which Dr. Borowski, who examined Richard soon after the accident, recommended physical therapy. Thus there was some evidence from which a jury could infer injury proximately caused by Wubben's negligence.

Defendants counter that according to Dr. Borowski's medical notes, three months after the accident Richard's pain was gone. They further suggest that the reemergence of back pain was due to a subsequent work-related injury. Against this view stands Dr. Schoedinger's diagnosis, based on Richard's account of the events, that the accident caused an annular tear in the cervical area which had yet to heal nine months after the accident. Defendants challenge the probative value of this diagnosis because Richard did not provide Dr. Schoedinger with details of his neck problems before the accident and the injury he sustained at work after the accident. Defendants have a point. The Federal Rules of Evidence allow an expert witness to give opinion testimony based on evidence "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Fed. R. Evid. 703. Naturally, if an expert's factual basis is inaccurate, his opinion testimony will be less valuable. Thus to the extent it was based on incomplete information, Dr. Schoedinger's opinion that the January 21, 1991 accident caused an annular tear was subject

to serious challenge. But that does not mean it was necessarily wrong. The fact that Richard had prior neck problems and later injured his back at work does not imply that the accident with the Schneider truck left Richard unscathed or defendants immune. That Richard had a prior similar injury does not inoculate defendants against negligence liability. *Montgomery v. Terminal Railroad Ass. of St. Louis,* 392 N.E.2d 77, 81 n.1 (Ill. App. Ct. 1979) ("In Illinois, a tortfeasor takes his victims as he finds them, and a pre-existing weakness of the victim is irrelevant, where the injury resulting from the tort caused the disability."). The same holds for a subsequent injury. *Cf. Gertz v. Campbell,* 302 N.E.2d 40, 43-44 (Ill. 1973) (original tortfeasor liable for aggravation of injury caused by subsequent tortfeasor (negligent physician) though original tortfeasor entitled to indemnification for damages caused by subsequent tortfeasor). It may be that Richard was completely recovered from this accident when he was injured at work, in which case defendants should not be liable for Richard's subsequent inability to find work. Or it may be that the injury Wubben caused was in fragile remission when it reappeared during the course of Richard's reasonable employment activities, in which case defendants could be found liable. Which of these or other possible interpretations of the evidence to believe was for the jury to decide. *See Campbell v. United States,* 904 F.2d 1188, 1192 (7th Cir. 1990) (trier of fact to determine weight to be given to testimony of expert medical witnesses); *McGrath v. Zenith Radio Corp.,* 651 F.2d 458, 469 (7th Cir. 1981) (causation issue for trier of fact). The jury apparently concluded the best interpretation was that the injury Richard sustained in the accident did not fully heal

and was a significant cause of Richard's employment difficulties. We cannot say the jury's decision was unreasonable as a matter of law.

C.

Defendants expend a paragraph at the end of their main brief on a cursory attack on the damages award, so we too shall not dwell long on the matter. Their argument is basically that the award was not linked to the evidence because the evidence did not show defendant caused the injury. They also contend that because Richard voluntarily left his prior job, the jury's award of three years of lost wages was improper. Our standard of review is highly deferential. "Because fixing a damage award is an exercise in fact-finding, only those awards that are monstrously excessive, born of passion and prejudice, or not rationally connected to the evidence may be altered." *Pincus v. Pabst Brewing Co.*, 893 F.2d 1544, 1554 (7th Cir. 1990).

As we held above, the evidence is sufficient to support the jury's finding of negligence; so Richard was entitled to some damages. And there was evidence that one reason Richard left his job was that the injuries Wubben inflicted rendered him unable to perform his work duties, which he anticipated would result in his termination. The Pyatts also desired to relocate. That alone would have required Richard to search for new employment. Defendants cite no authority suggesting that Richard cannot be compensated for the difficulties he experienced due to his injuries while searching for a new job. Injured plaintiffs are not forever locked into their

present employment. The jury was entitled to compensate a man who for a time was stripped of his ability to obtain a better job by defendants' negligence. As to the amount, defendants have not presented us with anything suggesting that the damages award was "monstrously excessive, born of passion and prejudice, or not rationally connected to the evidence." *Pincus*, 893 F.2d at 1554. We therefore have no grounds for upsetting it.

AFFIRMED.

In the
UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

August 12 1996

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*

Hon. JOHN L. COFFEY, *Circuit Judge*

Hon. DANIEL A. MANION, *Circuit Judge*

RICHARD PYATT and DIANE PYATT,

Plaintiffs-Appellees,

No. 95-2779 *v.*

SCHNEIDER NATIONAL CARRIERS, INC., and HENRY L. WUBBEN,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Illinois, East St. Louis Division.

No. 93 C 302

Clifford J. Proud,
Magistrate Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Defendants-Appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

RICHARD PYATT and DIANE PYATT, **Plaintiffs,** **vs.** **ELIZABETH PETROVICS, SCHNEIDER NATIONAL CARRIERS, INC., and HENRY LAVERNE WUBBEN,** **Defendants.**	**CIVIL NO. 93-302-CJP** (Filed Jul. 17, 1995)

ORDER

PROUD, Magistrate Judge:

Before the Court is defendants Schneider National Carriers, Inc. and Henry Laverne Wubben's[1] Motion for Judgment Notwithstanding the Verdict[2] or, in the Alternative, Motion for New Trial or, in the Alternative, for remittitur and supporting memorandum, plaintiff's response thereto and defendants' reply (Docs. Nos. 85, 86, 87, 88).

This matter was tried before a jury beginning on May 15, 1995. On May 17, 1995, the jury returned a verdict in

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[1] Defendans Schneider National and Wubben were sued as principal and agent. Agency was not contested.

[2] Pursuant to Fed.R.Civ.P. 50 a motion for Judgment Notwithstanding the Verdict is treated as a motion for Judgment as a Matter of Law.

favor of defendant Elizabeth Petrovics and against plaintiffs Richard Pyatt and Diane Pyatt and a verdict in favor of defendants Henry Laverne Wubben and Schneider National Carriers, Inc. and against Diane Pyatt. These verdicts are not contested. The jury also returned a verdict in favor of Richard Pyatt and against defendants Henry Laverne Wubben and Schneider National Carriers, Inc. Damages were determined to be $141,892.92. The verdict in favor of Mr. Pyatt and against defendants Schneider National Carriers, Inc. and Henry Laverne Wubben is the subject of the motion before the Court.

A. Motion for Judgment as a Matter of Law.

Defendants Schneider National and Wubben move for judgment as a matter of law contending that Mr. Pyatt failed to sustain his burden of proof that Wubben was negligent; failed to sustain his burden of proof that his injury was caused by the actions of Wubben; and that the verdict is inconsistent and in conflict with the evidence because the jury determined that Richard Pyatt's injury was caused by the collision between the truck and the Pyatt vehicle while Mr. Pyatt's theory was that the injury was caused by a collision with defendants Petrovics and Wubben.

> [A]lthough state law defines the elements of a claim and the burden of persuasion, federal law defines the standard for evaluating the sufficiency of evidence. If reasonable persons could not find that the evidence justifies a decision for a party on each essential element, the court should grant judgment as a matter of law . . .

***Mayer v. Gary Partners and Co., Ltd.*, 29 F.3d 330, 335 (7th Cir. 1994).**

Defendants argue that they are entitled to judgment as a matter of law because there was no submissible case of negligence by Mr. Pyatt. Defendants contend that Wubben was not speeding or violating any rule of the road and that no evidence was introduced that if Wubben was going at a lesser speed the accident would not have happened. This argument is without merit. At trial there was conflicting evidence how the accident occurred between the Pyatt vehicle, the Petrovics vehicle and Wubben's truck. It was undisputed, however, that there was ice on the bridge at the time of the accident. Further, the jury was apprised of Mr. Wubben's admission that, "Well, if I knew it was slippery as it was, why, I probably wouldn't have been driving as fast. I didn't realize it was as slippery as it was." It is the jury's function to determine the correct version of the accident.

The Court also rejects defendants' contention that the verdict is inconsistent. Testimony was presented that the impact with the Petrovics car was minimal. Based on the evidence, reasonable persons could find that the evidence justified a decision for Mr. Pyatt and against Schneider National and Wubben and not against defendant Petrovics. Defendants are not entitled to judgment as a matter of law.

B. Motion for New Trial.

[T]he district court has broad discretion in determining whether to grant a new trial. ***McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 516 (7th Cir. 1993).** The district

court must consider "if the verdict is against the weight of the evidence, the damages are excessive, or if for other reasons the trial was not fair to the moving party." ***Tapia v. City of Greenwood,*** **965 F.2d 336, 338 (7th Cir. 1992).** On motions for a new trial the federal standard applies, even in diversity cases. ***Hardin, Rodriguez & Bolvin Anesthesiologists, Ltd., v. Paradigm Ins. Co.,*** **962 F.2d 628, 640 (7th Cir. 1992);** ***Wassell v. Adams,*** **865 F.2d 849, 854 (7th Cir. 1989).** The standard of review for post-trial motions in diversity actions is that of the federal reasonable person. ***See Mayer v. Gary Partners and Co., Ltd.,*** **29 F.3d 330, 335 (7th Cir. 1994).**

Defendants contend the verdict for Richard Pyatt is not sustained by the evidence, there was no evidence of causal connection between the accident and Mr. Pyatt's injury, prejudicial questions were posed by Plaintiffs' counsel and the verdict was excessive or alternatively, should be apportioned.

Defendants argue that the evidence adduced at trial indicates that Wubben's truck did not hit plaintiff's car. This ignores the testimony of Diane Pyatt that she saw the Wubben truck hit the Pyatt car. It is up to the jury to determine the credibility of witnesses. While defendants may not believe this testimony is credible, the jury, not the defendants, is the finder of fact and determines the credibility of witnesses.

Defendants also assert that no evidence was presented which showed a causal connection between the accident of January, 1991 and Mr. Pyatt's injuries. Dr. Schoedinger testified, based upon a reasonable degree of medical certainty, that as a result of the January 25, 1991

accident Mr. Pyatt suffered an annular tear in the cervical spine (Schoedinger Dep. pp. 23-24). Clearly Dr. Schoedinger testified that the January, 1991 accident caused Mr. Pyatt to sustain an injury.

Defendants also assert that conflicting testimony as to whether Mr. Pyatt was wearing a seat belt goes to the issue of causation. The Court fails to see how conflicting testimony goes to the issue of causation. Defendants also argue that questions posed by plaintiffs' counsel caused prejudice to the defendants. However, these questions were objected to by defendants with the objections sustained by the Court. Defendants contend the mere asking of certain questions was so prejudicial that they are entitled to a new trial. No testimony was elicited. Defendants' argument that they were prejudiced by the mere asking of questions is without merit. Finally, Defendants argue that the verdict was excessive, necessitating a new trial on the issue of damages. The Court will discuss damages in the section below on remittitur. Suffice it to say that the Court disagrees that a new trial is required on the issue of damages.

Based on the evidence presented at trial, reasonable persons could find that the evidence justified a decision for Mr. Pyatt and against Schneider National and Wubben. Reasonable persons could also find that sufficient evidence was presented on the issue of causal connection. Further, the Court finds that defendants were not prejudiced by the asking of questions to which no evidence was elicited. Further, as discussed below, the jury verdict was not excessive. Accordingly, the Court **DENIES** defendants' Motion for a New Trial.

C. Motion for Remittitur or Alternative Motion for Apportionment of Damages.

The determination for remittitur is governed by federal standard. ***Mayer*, 29 F.3d at 335; *Gorlikowski v. Tolbert*, 52 F.3d 1439, 1446 (7th Cir. 1995).**

> "The test in this circuit for reviewing a jury verdict . . . is not whether it was against the weight of the evidence, but whether there is a reasonable basis in the record for the verdict . . . If this test is met, we will not reweigh the evidence, but will let the verdict stand." ***Carmel v. Clapp & Eisenberg, P.C.*, 960 F.2d at 703** (Citations omitted). Further, a jury's damage award is vacated "only if the verdict is so monstrously excessive or it [sic] there is no rational connection between the evidence on damages and the verdict." ***McNabola v. Chicago Transit Author*, 10 F.3d 501, 516 (7th Cir. 1993)** (quotations and citations omitted).

***Gorlikowski*, 52 F.3d at 1446.**

Mr. Pyatt presented evidence which established his damages and continuing disability. Testimony presented clearly set forth that Mr. Pyatt was injured, and the extent of that injury. The jury award was not excessive in relation to Mr. Pyatt's injury. Furthermore, there is a rational connection between the evidence on damages and the verdict. Accordingly, a remittitur is not mandated. The Court declines to usurp the function of the jury and to alter the jury's judgment where the award was not excessive. Accordingly, the Motion for Remittitur is hereby **DENIED.**

Alternatively, defendants contend that the jury award should be apportionment by reducing the award as to Schneider National and Wubben to one-half so that the judgment is consistent with Mr. Pyatt's theory that his injuries were caused by defendants Wubben and Petrovics. The jury found no negligence on behalf of defendant Petrovics and assessed damages only against defendants Schneider National and Wubben. As stated numerous times in this Order, reasonable persons could come to the same conclusion based upon the evidence presented at trial. Accordingly, the alternative Motion for Apportionment is hereby **DENIED.**

CONCLUSION

Based upon the foregoing, defendants Schneider National Carriers, Inc. and Henry Laverne Wubben's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, Motion for New Trial or, in the Alternative, for Remittitur is hereby **DENIED.**

IT IS SO ORDERED:

DATED: July 17, 1995.

/s/ Clifford J. Proud
CLIFFORD J. PROUD
UNITED STATES
MAGISTRATE JUDGE

AO 450 (Rev. 5/85) Judgment in a Civil Case ®

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF ILLINOIS

RICHARD PYATT AND DIANE PYATT,

Plaintiffs,

v.

ELIZABETH PETROVICS, HENRY LAVERNE WUBBEN, and SCHNEIDER NATIONAL CARRIERS, INC.

Defendants,

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 93-302-CjP

(Filed May 17, 1995)

X **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment is entered in favor of defendant, Elizabeth Petrovics and against plaintiff, Diane Pyatt. Judgment is entered in favor of defendant, Elizabeth Petrovics and against plaintiff, Richard Pyatt. Judgment is entered in favor of defendants, Henry Laverne Wubben and Schneider National Carriers, Inc. and against plaintiff, Diane Pyatt.

Judgment is entered in favor of plaintiff, Richard Pyatt and against defendants, Henry Laverne Wubben

and Schneider National Carriers, Inc. in the amount of $141,892.92 (one hundred forty-one thousand, eight hundred and ninety-two dollars and ninety-two cents).

All judgments are in accordance with jury verdicts.

5/17/95	Stuart J. O'Hare
Date	*Clerk*
/s/ Clifford J. Proud	/s/ Angela Uehlewald
Approved by	*(By) Deputy Clerk*

Verdict B

(Filed May 17, 1995)

We, the jury, find for Richard Pyatt on his claim and against the following defendant or defendants:

Elizabeth Petrovics	Yes ___	No ✓
Henry Laverne Wubben and Schneider National Carriers, Inc.:	Yes ✓	No ___

First: We find that the total amount of damages suffered by Richard Pyatt as a proximate result of the occurrence in question is itemized as follows:

The reasonable expense of necessary medical care, treatment and services received:	$ 2,975.32
The value of lost earnings:	$ 38,917.60

Pain and suffering experienced and reasonably certain to be experienced in the future as a result of the injuries:	$ 50,000.00
Disability resulting from the injury:	$ 50,000.00
TOTAL:	$141,892.92

Second: Assuming that 100% represents the total combined negligence of all persons or entities whose negligence proximately caused Richard Pyatt's injury and any defendant whom you have found liable, we find the percentage of negligence attributable to each as follows:

(a) Elizabeth Petrovics: 0%

(b) Henry LaVerne Wubben and Schneider National Carries, Inc.: 100%

(Instructions to Jury: If you find any defendant not liable to the plaintiff in a way that proximately caused plaintiff's injury, then you should enter a zero (0) as to that person or persons.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

RICHARD PYATT, et al.,	)	
	)	
Plaintiffs,	)	Cause No: 93-302-CJP
vs.	)	
	)	
ELIZABETH PETROVICS, et al.,	)	
	)	
Defendants.	)	

MOTION FOR DIRECTED VERDICT AT THE CLOSE OF PLAINTIFF DIANE PYATT'S EVIDENCE

Plaintiff Diane Pyatt having closed her evidence, defendants, Schneider National Carriers, Inc. and Henry Wubben, by and through their attorneys, move this Court, pursuant to Rule 50(a) of the Federal Rules of Civil Procedure, to direct a verdict in defendants' favor in that the facts are undisputed, there is no conflict in the evidence, and the facts and evidence offered and received into evidence do not entitle plaintiff Diane Pyatt to any recovery in this case on her claim for personal injury because, as a matter of law, plaintiff Diane Pyatt has failed to sustain her burden of proving that defendants were negligent or that their negligence proximately resulted or caused any injury to the plaintiff Diane Pyatt.

Respectfully submitted,
ANDERSON & GILBERT

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

RICHARD PYATT, et al.,	)	
Plaintiffs,	)	Cause No: 93-302-CJP
vs.	)	
ELIZABETH PETROVICS, et al.,	)	
Defendants.	)	

MOTION FOR DIRECTED VERDICT AT THE CLOSE OF PLAINTIFF RICHARD PYATT'S EVIDENCE

Plaintiff Richard Pyatt having closed his evidence, defendants, Schneider National Carriers, Inc. and Henry Wubben, by and through their attorneys, move this Court, pursuant to Rule 50(a) of the Federal Rules of Civil Procedure, to direct a verdict in defendants' favor in that the facts are undisputed, there is no conflict in the evidence, and the facts and evidence offered and received into evidence do not entitle plaintiff Richard Pyatt to any recovery in this case on his claim for personal injury because, as a matter of law, plaintiff Richard Pyatt has failed to sustain his burden of proving that defendants were negligent or that their negligence proximately resulted or caused any injury to the plaintiff Richard Pyatt.

Respectfully submitted,
ANDERSON & GILBERT

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

RICHARD PYATT, et al.,	)	
	)	
Plaintiffs,	)	Cause No: 93-302-CJP
vs.	)	
	)	
ELIZABETH PETROVICS, et al.,	)	
	)	
Defendants.	)	

MOTION FOR DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE

All evidence having been introduced, defendants, Schneider National Carriers, Inc. and Henry Wubben, by and through their attorneys, move this Court, pursuant to Rule 50(a) and (b) of the Federal Rules of Civil Procedure, to direct a verdict in their favor and against Richard Pyatt in that the facts are undisputed, there is no conflict in the evidence, and the facts and evidence offered and received into evidence by plaintiff Richard Pyatt demonstrate, as a matter of law, that plaintiff Richard Pyatt is not entitled to recover from these defendants because he has failed to sustain his burden of proving that defendants were negligent or that their negligence directly and proximately caused injury to the plaintiff Richard Pyatt.

Respectfully submitted,
ANDERSON & GILBERT

/s/ Francis X. Duda
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

RICHARD PYATT, et al.,	)	
Plaintiffs,	)	
	)	Cause No: 93-302-CJP
vs.	)	
ELIZABETH PETROVICS, et al.,	)	
Defendants.	)	

MOTION FOR DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE

All evidence having been introduced, defendants, Schneider National Carriers, Inc. and Henry Wubben, by and through their attorneys, move this Court, pursuant to Rule 50(a) and (b) of the Federal Rules of Civil Procedure, to direct a verdict in their favor and against Diane Pyatt in that the facts are undisputed, there is no conflict in the evidence, and the facts and evidence offered and received into evidence by plaintiff Diane Pyatt demonstrate, as a matter of law, that plaintiff Diane Pyatt is not entitled to recover from these defendants because she has failed to sustain his burden of proving that defendants were negligent or that their negligence directly and proximately caused injury to the plaintiff Diane Pyatt.

Respectfully submitted,
ANDERSON & GILBERT

/s/ Francis X. Duda
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

RICHARD PYATT, et al., Plaintiffs,	)	Cause No: 93-302-CJP
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ELIZABETH PETROVICS, et al., Defendants.	)	

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4/IPI No. 15.01
Defendant's Instruction No. 4

When I use the expression "proximate cause," I mean any cause which, in natural or probable sequence, produced the injury complained of. It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it, causes injury.

IPI 21.01
Plaintiffs' Instruction No. 6

When I say that a party has the burden of proof on any proposition, or use the expression "if you find," or "if you decide," I mean you must be persuaded, considering all the evidence in the case, that the proposition on which he has the burden of proof is more probably true than not true.

IPI 41.01
Plaintiffs' Instruction No. 17

The rights of plaintiffs Richard Pyatt and Diane Pyatt are separate and distinct. Each is entitled to a fair consideration of his or her own case and you will decide each plaintiff's case as if it was a separate lawsuit. Each plaintiff's case must be governed by the instructions applicable to that case.

IPI 10.01
Plaintiffs' Instruction No. 19

When I use the word "negligence" in these instructions, I mean the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not do, under circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide.

IPI 20.01
625 ILCS5/11-703
625 ILCS5/11-601
Plaintiffs' Instruction No. 10

The plaintiffs claim they were injured and sustained damage, and that the defendants were negligent in one or more of the following respects:

Defendant Petrovics attempted to overtake plaintiffs' car proceeding in the same direction and negligently failed to pass to the left at a safe distance, or

Defendant Petrovics negligently drove to the right side when she was not safely clear of the Pyatts' vehicle which defendant Petrovics was overtaking

Defendant Wubben drove his semi-tractor trailer at a rate of speed that was not safe given the traffic conditions and the weather, or

Defendant Wubben failed to decrease his speed in order to avoid colliding with the plaintiffs' car which was on the highway

The plaintiffs further claim that one or more of the foregoing was the proximate cause of their injuries.

The defendants deny that they were negligent in doing the things claimed by plaintiffs and deny that any claimed act or omission on the part of defendants was a proximate cause of plaintiffs' claimed injuries.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

RICHARD PYATT and DIANE PYATT, Plaintiffs, v. ELIZABETH PETROVICS, 7238 Dorsett Avenue University City, Missouri 63130 and SCHNEIDER NATIONAL CARRIERS, INC. and HENRY LAVERNE WUBBEN 306 W. 1st Avenue Indianola, Iowa Defendants.	Civil No. 93-302WLB CJRA TRACK "C" (Filed June 2, 1993)

AMENDED
COMPLAINT

COUNT I

Comparative Negligence Richard Pyatt
v. Elizabeth Petrovics

COMES NOW plaintiff Richard Pyatt, by and through his attorney, Robbye Hill Toft, and for his cause of action against defendant Elizabeth Petrovics states:

1. Plaintiff is a resident of Illinois residing at Route 1, Box 31, Grand Tower, Illinois, and at all times herein

referenced is the husband of plaintiff Diane Pyatt who resides with him at the same address.

2. Defendant Elizabeth Petrovics is a resident of St. Louis County, Missouri. She resides at 7238 Dorsett Avenue, University City, Missouri 63130.

3. On or about January 25, 1991, at approximately 10:45 p.m., plaintiff Richard Pyatt was riding as a passenger in the front seat of a 1980 Chevrolet Citation driven by his wife, Diane Pyatt, when said vehicle was caused to come into collision with vehicles operated by defendants Petrovics and Wubben. Said collisions occurred alternatively as a direct and proximate result of the individual, joint and concurring negligence of Elizabeth Petrovics in the following described manner.

4. At the afore-referenced time, defendant Petrovics was operating a blue Escort westbound on Interstate Highway 55/70 in St. Clair County, Illinois, approximately one-half mile east of the Illinois/Missouri state line on the Poplar Street Bridge spanning the Mississippi River at Canteen Township, Illinois.

5. Defendant Petrovics at the afore-referenced time and place, driving westbound on Interstate 55/70, negligently permitted her automobile to swerve to the north from its position in the second lane south of the curb for westbound traffic lanes. Petrovics' automobile swerved across the curb lane and against the retaining wall at which time defendant Petrovics caused her vehicle to stop suddenly without warning and in a position directly in the path of the automobile in which plaintiff Richard Pyatt was riding. As a direct result of defendant's action as above described, the vehicle in which plaintiffs Pyatt

were riding was caused to collide with the Petrovics vehicle and to stop suddenly.

6. Thereafter, the vehicle in which plaintiffs Pyatt were riding was struck violently at least three times by a 1980 International Cab-Over Tractor Truck driven for defendant Schneider National Carriers, Inc. by defendant Henry L. Wubben.

7. The aforesaid collisions totally destroyed plaintiffs' vehicle and caused plaintiffs, including Richard Pyatt, to sustain serious, permanent and painful injuries as more particularly described hereinafter.

8. Defendant Petrovics negligently and proximately caused or contributed to cause plaintiffs' damage and injury in the following manner.

A. Defendant Petrovics was negligent in that she was operating her vehicle at an excessive, speed under the circumstances.

B. Defendant Petrovics was negligent in that she failed to keep her vehicle under control in violations of the laws of the state of Illinois.

C. Defendant Petrovics negligently failed to signal her intention to turn or to change lanes.

D. Defendant Petrovics failed to keep a careful lookout for the conditions of the roadway on which she was operating; which failure caused her to operate her vehicle into the lane in which plaintiffs' vehicle was operating.

E. Defendant Petrovics negligently failed to stop her vehicle or to avoid a collision with plaintiffs' vehicle after the danger of such a collision was apparent to her.

F. Defendant Petrovics negligently failed to give an adequate warning of the fact that she was changing lanes and in so doing, she negligently failed to yield the right-of-way.

G. Defendant Petrovics negligently failed to sound a warning of her intention to change lanes, and

H. Defendant Petrovics negligently stopped in a lane reserved for moving traffic.

9. As a direct result of the negligence of defendant Petrovics as aforestated, plaintiff Richard Pyatt was caused to suffer permanent injuries, including but not limited to, a lumbar and cervical sprain, a ruptured lumbar and cervical disc, headaches, contusions of the body, and strains and sprains of the various ligaments and tendons of the body; all of which injuries are painful and permanent and for which plaintiff Richard Pyatt has incurred special damages including medical expense and lost wages, the sum for which is in excess of $3,000.00 and all of which damage occurred as a direct result of the negligence of defendant Petrovics.

WHEREFORE, plaintiff Richard Pyatt prays the Court enter judgment against defendant Elizabeth Petrovics in a sum in excess of $15,000.00 and for such other orders as the Court may deem just under the circumstance. Plaintiff prays the Court for a trial of said cause by jury.

COUNT II

Comparative Negligence – Richard Pyatt
v. Schneider National Carriers, Inc.

COMES NOW plaintiff Richard Pyatt and for his cause of action against Schneider National Carriers, Inc. states:

1. Plaintiff is a resident of Illinois residing at Route 1, Box 31, Grand Tower, Illinois, and at all times herein referenced is the husband of plaintiff Diane Pyatt who resides with him at the same address.

2. Schneider National Carriers, Inc. acting through its agent and driver, defendant Henry L. Wubben, was operating an International Truck Tractor Cab-Over 1987 truck trailer vehicle which was westbound on Interstate 55/70 on the Poplar Street Bridge in the state of Illinois as afore-described when defendant Wubben, acting for himself and defendant Schneider National Carriers, Inc., negligently permitted the front of his vehicle to strike the rear of the vehicle which plaintiffs were riding when plaintiffs' vehicle was stopped.

3. Defendant Schneider National Carriers, Inc. and defendant Wubben were negligent in the operation of the afore-referenced tractor trailer in the following respects:

A. Defendant Wubben negligently operated the vehicle at an excessive speed which was too fast for the conditions then present.

B. Defendant Wubben negligently failed to bring his vehicle to a stop or to swerve or to otherwise avoid a collision with the vehicle in which plaintiffs were riding

after a reasonable time had elapsed for him to determine that the likelihood of a collision was apparent.

C. Defendant Wubben negligently failed to keep a careful lookout.

D. Defendant Wubben negligently permitted the front of his vehicle to strike the rear of plaintiffs' vehicle which was lawfully stopped on the roadway.

E. Defendant Wubben negligently followed too closely behind plaintiffs' vehicle and other vehicles and as a result was unable to properly control his vehicle in violation of the laws of the state of Illinois.

F. Defendant Wubben negligently failed to maintain the Schneider National Carriers, Inc. truck in a safe condition so that it could be reasonably operated under the circumstances then present or such failure to maintain the vehicle was the result of the negligence of defendant Schneider National Carriers, Inc.'s employees responsible for said maintenance.

4. As a direct result of the negligence of defendant Schneider National Carriers, Inc., acting by and through its agent Henry L. Wubben, plaintiff Richard Pyatt was caused to suffer permanent and serious personal injuries, including but not limited to lumbar and cervical disc strain and sprain, ruptured lumbar and cervical discs, headaches, contusions, strained and torn ligaments throughout the body, torn tendons and permanent pain; all of which injuries are permanent and will be permanently painful and disabling.

* * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

RICHARD PYATT and DIANE PYATT, Plaintiffs,	)	Civil No. 93-302-WLB
vs.	)	Removed from 93-L-64 St. Clair County, Illinois
ELIZABETH PETROVICS, SCHNEIDER NATIONAL CARRIERS, INC., and HENRY LAVERNE WUBBEN, Defendants.	)	(Filed May 3, 1993)

NOTICE FOR REMOVAL OF CIVIL ACTION

NOW COMES the Defendant in the above-captioned action, Schneider National Carriers, Inc., a foreign corporation, and hereby represents unto the Court as follows:

1. On or about January 22, 1993, plaintiff in the above-captioned action instituted a civil action against the Petitioner, Schneider National Carriers, Inc., Henry L. Wubben, and Elizabeth Petrovics, Defendants in said action, in the Circuit Court for the Twentieth Judicial Circuit, St. Clair County, Illinois, by filing a Complaint herein, a copy of which is attached hereto, marked Exhibit "A" and by this reference incorporated herein and made a part hereof of this Petition.

2. That thereafter a copy of this Complaint was forwarded to Schneider National Carriers, Inc. on April 7, 1993, by reason of service on Schneider National Carriers' agent for service of process.

3. At the time of the institution of said action in said Circuit Court, the Plaintiff, was a resident and citizen of the State of Illinois.

4. At the time of the institution of said action in said Circuit Court, your Petitioner, Schneider National Carriers, Inc., had its principle [sic] place of business in the State of Wisconsin and is further is [sic] a citizen incorporated in the State of Nevada.

5. That Elizabeth Petrovics, as appears from the face of the Complaint is a citizen of the State of Missouri, and Henry L. Wubbens is a citizen of the State of Iowa.

6. As more fully appears from said Complaint, this action is one in which the Plaintiff seeks to recover judgment against the Defendants for damages and losses which the Plaintiff claims and alleges resulted from alleged negligence on the part of the Defendants in a sum in excess of Fifteen Thousand ($15,000.00) Dollars plus costs of action.

7. As more fully appears from said Complaint, this action is a civil action in which the defendant believes in good faith the matter in controversy exceeds, exclusive of interest and costs the sum of Fifty Thousand ($50,000.00) Dollars and is between citizens and residents of different states of the United States; that this action, and the claims and the causes of action sued upon therein are of a civil nature of and over which the District Court of the United States in and for the Southern District of Illinois, possesses and has concurrent jurisdiction with the Circuit Courts of Illinois by virtue of the provisions of the Constitution of the United States of America, and the Acts of

Congress of the United States of America, in such case made and provided.

8. Defendants, Elizabeth Petrovics and Henry L. Wubbens also consent to the removal of this case to the United States Court for the Southern District of Illinois.

9. This Petition is filed within thirty (30) days after April 7, 1993, the date upon which defendant received a copy of the initial pleading setting forth the claim for relief from the plaintiff's counsel, and it was also filed within the time allowed Petitioner under the applicable provisions of Chapter 89, Title 28, U.S. Code, entitled "Judicial Code and Judiciary", in which to file this Petition for the removal of said civil action from the Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois, to this United States District Court.

10. A copy of the above-mentioned Petition as attached hereto constitutes a true and correct copy of all process, pleadings and Order now on file in said Circuit Court.

11. This Court has original jurisdiction under Title 28, U.S. Code, Section 1332 and said cause is removable to this Court by virtue of the provisions of Title 28, U.S. Code, Section 1441.

WHEREFORE, Petitioner prays that this Petition be granted and that said action be removed in its entirety from the Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois, to this District Court of the

United States for the Southern District of Illinois, as provided by law.

Respectfully submitted,

HINSHAW & CULBERTSON

BY /s/ Michael A. Lawder
MICHAEL A. LAWDER, NO. 06189990
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AS ATTORNEY FOR SCHNEIDER
NATIONAL CARRIERS, INC.

IN THE CIRCUIT COURT
TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

RICHARD PYATT and DIANE PYATT, Route 1, Box 31 Grand Tower, Illinois Plaintiffs, v. ELIZABETH PETROVICS, 7238 Dorsett Avenue University City, Missouri 63130 and SCHNEIDER NATIONAL CARRIERS, INC. 11861 S. Cottage Grove Suite B Chicago, Illinois 60628 and HENRY LAVERNE WUBBEN, 1815 Washington Street Eldora, Iowa 50627 Defendants.	Civil No. 93L64 Major/Civil Plaintiffs Demand Trial by Jury

COMPLAINT

COUNT I

Comparative Negligence Richard Pyatt
v. Elizabeth Petrovics

COMES NOW plaintiff Richard Pyatt, by and through his attorney, Robbye Hill Toft, and for his cause of action against defendant Elizabeth Petrovics states:

1. Plaintiff is a resident of Illinois residing at Route 1, Box 31, Grand Tower, Illinois, and at all times herein referenced is the husband of plaintiff Diane Pyatt who resides with him at the same address.

* * *

(2)

Supreme Court, U.S.
FILED
DEC 5 1996
CLERK

No. 96-374

In The

Supreme Court of the United States

October Term, 1996

SCHNEIDER NATIONAL CARRIERS, INC.
AND HENRY LAVERNE WUBBEN,

Petitioners,

vs.

RICHARD PYATT AND DIANE PYATT,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF OF RESPONDENT RICHARD PYATT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBBYE HILL TOFT
633 Sherwood Drive
St. Louis, Missouri 63119
(314) 961-6785

Counsel for Respondent

Dated: December 5, 1996

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

14 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Respondent respectfully suggests that the remaining issues framed by petitioner are more accurately stated as follows:

1. Should the federal standard for determining the sufficiency of the evidence apply in a diversity case when pleadings, discovery and evidentiary questions have been determined according to the federal rules?

2. Would petitioners have been granted judgment as a matter of law if the trial court applied the Illinois *Pedrick* standard for determining the sufficiency of the evidence rather than the federal reasonable man standard?

PARTIES TO THE PROCEEDING

Respondent Richard Pyatt, an individual, was an Illinois resident at the time his Complaint was filed.

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STATEMENT OF THE CASE

Respondent Richard Pyatt (Pyatt) incorporates by reference the factual statements in the opinion of the Seventh Circuit Court of Appeals. (Pet. App. 1-5) Respondent notes that in the body of its opinion, the Seventh Circuit Court of Appeals referred to "The fact that Richard had prior neck problems and later injured his back at work. . . . " (Pet. App. 8) There was no evidence of either at trial.

REASONS FOR DENYING THE WRIT

First, respondent admits that Circuits have shifted thoughts as to whether, in diversity actions, federal courts should review of the sufficiency of the evidence by the federal standard or the applicable state standard. Petitioners have not provided any reason why the standard for judging the sufficiency of the evidence post-trial should be different from that applied both pre-trial and in determining the sufficiency of the evidence on damages. Second, petitioners have failed to show how application of the state standard in reviewing the sufficiency of the evidence would have produced a result different from that produced by application of the federal standard for reviewing the sufficiency of the evidence; i.e., how the result of the litigation materially differed because petitioner removed the case to federal court. Third, the sufficiency of the evidence is case specific, and is not an issue that warrants the Court's attention.

I. The Federal District Court Properly Applied The Federal Reasonable Man Standard In Reviewing The Sufficiency Of The Evidence In This Case.

The federal district court followed the Seventh Circuit's 1994 opinion in *Mayer v. Gary Partners & Co.*, 29 F.2d 330 at 334-335, that the standard in federal court for judgment as a matter of law is a federal not state standard, namely, whether reasonable minds could deem the evidence adequate under the governing [state] substantive rule. (Pet. App. 5) Petitioners seek reversal of the Seventh Circuit and the majority of the Circuits applying the federal reasonable man standard.

Petitioners raise the flag of intrusive federal government, claiming that applying a federal standard in a diversity action violates the *Erie Doctrine*. In doing so Petitioners overlook the twin aims of the *Erie Doctrine*: to discourage forum shopping and to avoid inequitable administration of the laws. *Erie R. Co. v. Tompkins*, 304 U.S. 64 at 74-75, 58 S.Ct. 817 at 820-21 (1938).

As to the first aim of the *Erie Doctrine*, the avoidance of forum shopping, it must be noted that respondent Pyatt did not choose the forum of the U.S. District Court. Rather, petitioners removed the case to federal court. (Pet. App. 36-39)

There being no concern that respondent was guilty of forum shopping, the next concern driving development of the *Erie Doctrine* must be addressed: inequitable administration of the laws. Noticeably absent from petitioners' brief before the Seventh Circuit and its Petition for Writ of Certiorari is any discussion on this point.

The Court in *Erie* was concerned with fundamental equal protection problems. 304 U.S. at 74-76, 58 S.Ct. at 820-21. To assist courts in addressing that issue, this Court set forth the "outcome-determinative" test in *Guaranty Trust Company of New York v. York*, 326 U.S. 99 at 109, 65 S.Ct. 1464 at 1470 (1945). Subsequently this Court noted in *Hanna v. Plumer* that the problem in applying the "outcome-determinative" test or any other "litmus paper" criterion can lead one to sense that every procedural variation between state and federal court procedure is "outcome-determinative". 380 U.S. 460 at 468, 85 S.Ct. 1136 at 1142.

Unfortunately, *Hanna* provides little further guidance in this case. In *Hanna*, the Court was asked to decide if state law requiring service of process on the executor of an estate by leaving suit papers literally in the executor's hand controlled so as to invalidate service accomplished under the Federal Rules of Civil Procedure by leaving suit papers at the executor's home with his spouse. 380 U.S. at 461-62, 85 S.Ct. at 1138-39. Given the Federal Rule of Civil Procedure directly on point, this Court chose not to "disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act." 380 U.S. at 473-74, 85 S.Ct. at 1145.

There is no federal rule to guide us here. Rather, there is a uniform "standard" which federal courts have adopted to determine if a jury's verdict should stand. Is such a standard an encroachment upon "those primary decisions respecting human conduct which our constitutional system leaves to state regulation?" That was the

question asked by Justice Harlan in his concurring opinion in *Hanna*. 380 U.S. at 475, 85 S.Ct. at 1146.

The only answer to this question is that it is not. No Illinois citizen considers the standard by which a judge will determine the sufficiency of the evidence in a jury trial before that citizen decides how to conduct his affairs. Such concerns are entertained solely by attorneys and judges.

Petitioners have presented no theory under which *Erie* or its progeny would require application of the Illinois state standard of review rather than the federal. The forum shopping, if any, was paid for by the petitioners. There is no suggestion of a due process violation. No one acted or failed to act based upon a mistaken belief that the adequacy of the evidence would be decided by the state rather than the federal standard.

Given that Federal Rules of Evidence and Civil Procedure often more liberally allow discovery and admission of evidence than do states, the federal standard for reviewing the sufficiency of the evidence necessarily reflects liberality of the discovery and evidentiary rules. Theoretically, a state's discovery and evidentiary rules are in concert with state standards for reviewing the sufficiency of the evidence.

Petitioners ask federal courts to switch horses, not midstream, but rather one step before reaching the bank. Petitioners want federal judges to attempt to decipher each state's standard for reviewing the sufficiency of the evidence, when the state courts themselves are unclear as to their standard of review. *See Pedrick v. Peoria and Eastern Railroad Company*, 37 Ill.2d 494, 229 N.E.2d 504 (Ill.

1967). In essence, petitioners seek to have the state law in diversity cases determine who should decide the case: when is there sufficient evidence to permit a jury to render the verdict and when should a federal judge in a diversity case direct the verdict.

The Seventh Circuit noted that "nothing in *Erie* or the Rules of Civil Procedure commands a federal court to accept the state's views about who should evaluate the evidence". *Mayer v. Gary Partners and Co., Ltd.*, 29 F.3d 330 (1994).

> If reasonable persons could not find that the evidence justifies a decision for a party on each essential element, the court should grant judgment as a matter of law – before trial under Rule 56, later under Rule 50, and using the same federal standard each time. By linking the standard for summary judgment to the standard for overturning a verdict, *Anderson* [*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)] and *Celotex* [*Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)] leave no other option.

29 F.3d 330, 335.

The federal standard is eminently fair: could reasonable minds deem the evidence adequate under the Illinois substantive law. *Id.* Perhaps the Court should relieve the circuits of their concern as to which standard they should apply in reviewing the sufficiency of the evidence in diversity cases. Certainly the reasonable man standard is the most thoughtful and best articulated. It is also the simplest standard by which citizens of any state can

determine if they can prove their case or defend themselves in a civil jury trial.

II. Petitioners Have Failed To Show How Application Of The State Standard In Reviewing The Sufficiency Of The Evidence Would Have Produced A Result Different From That Produced By Application Of The Federal Standard For Reviewing The Sufficiency Of The Evidence.

Federal Rule of Civil Procedure 50 sets forth the standard by which federal courts shall determine if a judgment as a matter of law shall be granted during a trial:

> (1) If during a trial by jury a party has been fully heard on an issue and *there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue,* (emphasis added) the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

While section (b) of Rule 50 addressed renewing a Motion for Judgment after trial, it does not restate the standard of review. However, this Court in *Anderson* and *Celotex, supra,* has directed that federal courts consistently apply the reasonable jury standard from summary judgment considerations through post-trial motions.

The standard of review applied by Illinois courts was most recently clarified by the Illinois Supreme Court in

Pedrick v. Peoria and Eastern Railroad Company, 229 N.E.2d 504, 37 Ill.2d 494 (1967). It is clear that until *Pedrick*, Illinois had not clearly enunciated the precise standard to be applied to determine when a verdict should be directed or a judgment entered. 229 N.E.2d 504 at 509.

The great irony of Petition for Certiorari in this case becomes apparent when one studies the basis for the Illinois standard of review and the Illinois Supreme Court's great effort to pattern its standard after the federal reasonable man standard:

> This court has said with some frequency that negligence and contributory negligence become questions of law when all of the evidence, viewed in its aspect most favorable to the party against whom the court would rule is such that *reasonable minds would reach the same conclusion.* (emphasis added)

37 Ill.2d at 502, 229 N.E.2d at 509.

The Illinois Supreme Court has also expressed an apparently different standard: that when all of the evidence is considered in its light most favorable to the party against whom the verdict would be directed, together with all reasonable inferences therefrom, and it appears that there is no evidence in favor of the nonmovant on an essential issue in the case, it is the trial court's duty to direct the jury accordingly. *Smith v. Bishop*, 32 Ill.2d 380, 384, 205 N.E.2d 461 (1965). But the *Pedrick* court went on to note that the Illinois Supreme Court had linked the reasonable minds test and the any evidence test by quoting the standards interchangeably, 37 Ill.2d 494 at 503, 229 N.E.2d 504 at 509.

To clarify what might be murky water left by the *Pedrick* standard, the Illinois Supreme Court stated in black and white terms in its 1992 opinion in *Maple v. Gustafson*:

> The court has no right to enter a judgment n.o.v. if there is any evidence, together with reasonable inferences to be drawn therefrom, demonstrating a substantial factual dispute, or where the assessment of credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome.

177 Ill. Dec. 438 at 442, 603 N.E.2d 508.

Petitioners here attempted to entice Magistrate Proud to do exactly what the Illinois Supreme Court forbade Illinois judges to do in *Maple* – to take away a verdict because of alleged conflicting evidence. Petitioners would have no basis for j.n.o.v. in the Illinois courts, and they had no basis for judgment as a matter of law in the U.S. District Court in the Southern District of Illinois.

Regardless of the standard by which the evidence in this case is reviewed, plaintiff made a submissible case. Petitioners' arguments on conflicting evidence were for closing argument, not for the U.S. Supreme Court. While there is a lack of clarity on the applicable standard among the Circuits, the standard applied was irrelevant in this case. This case does not present an illustration by which application of the federal standard versus the state standard would produce different results.

III. The Sufficiency Of The Evidence Is Case Specific, And Is Not An Issue That Warrants The Court's Attention.

Petitioners have alleged no denial of a constitutional right by application of the federal standard of review to an action petitioners themselves removed to the District Court. While the Illinois standard and the federal standard may be framed in different language, they produce the same result. The Illinois Supreme Court, after considering the standard of review not only in the federal courts but also in the fifty states, concluded its decision in Pedrick stating:

> And since it is well settled that trial courts may constitutionally direct verdicts, minor variations in the rules governing such action can scarcely render it unconstitutional.

37 Ill.2d at 511, 229 N.E. at 514.

So it can be said here. To bother this Court with a review of each evidentiary issue in a minor personal injury case cannot be justified.

CONCLUSION

Petitioners have presented no basis for granting the Petition for Writ of Certiorari in this action, and the Petition should therefore be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 96-374

In The

Supreme Court of the United States

October Term, 1996

SCHNEIDER NATIONAL CARRIERS, INC.
AND HENRY LAVERNE WUBBEN,

Petitioners,

vs.

RICHARD PYATT AND DIANA PYATT,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY BRIEF

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STATEMENT OF THE CASE

The basic facts in this appeal are not in dispute. Because Dr. George Schoedinger, III's deposition testimony was read to the jury, there is no issue of credibility. Appellants ask the Court to accept these facts and then determine whether they justify the conclusion in law reached by the trial and appellate courts that the evidence was sufficient to submit the case to a jury. But under what standard of review should this issue be evaluated and resolved? Over Appellants' objection, the district court and the Seventh Circuit applied a "federal reasonable man standard" instead of the Illinois state standard of review which we contend is constitutionally required. *Erie Railroad Company v. Thompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). On this basis, Appellants ask this Court to grant Certiorari.

FURTHER REASONS FOR GRANTING THE WRIT

In *Gasperini v. Center for Humanities, Inc.*, ___ U.S. ___, 116 S.Ct. 2211, 135 L.Ed. 659 (1996), Justice Ginsberg, for the majority, held that the New York statutory standard of review to measure the alleged excessiveness of a jury's verdict ("deviates materially") must be applied by the district court in a diversity action for damages under New York state law. The opinion states that, "In light of *Erie*'s doctrine, the federal appellate court must be guided by the damage control standard state law supplies." *Gasperini*, 116 S.Ct. at 2228. In remanding the case, Justice Ginsberg commented that "It does not appear that the district court checked the jury's verdict against the

relevant New York decisions demanding more than "industry standard" testimony to support an award the size the jury returned in this case." *Id.* at 2228. Justice Stevens agreed with the majority on the application of a state standard of review under Rule 59 and with conclusion that such review did not violate the re-examination clause of the Seventh Amendment, but would have affirmed the Second Circuit Court of Appeals' reduction of the damage award. *Id.* at 2225-2226.

Justice Scalia, on behalf of Justice Renquist and Justice Thomas, apparently would have affirmed the trial court decision. The minority state that the majority has committed "the classic *Erie* mistake of regarding whatever changes the outcome as substantive." *Id.* at 2238. The minority would have rejected the state standard of review as a matter of procedure. *Hanna v. Plumer,* 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965).

Like *Gasperini,* the district court in the instant case did not consider the applicable state standard of review. Appellants suggest that *Gasperini* is an important case in the consideration of this Petition which seeks review under Rule 50 of the Federal Rules of Civil Procedure.

The Seventh Circuit's About Face

For over thirty years the Seventh Circuit expressly followed a state standard of review for sufficiency of the evidence. *Oberman v. Dun & Bradstreet, Inc.,* 507 F.2d 349 (7th Cir. 1974). Contrary to Respondent's contention, in 1967 the Illinois Supreme Court, after extensive review of the standards that were then in use in other states, expressly rejected a "reasonableness test" for a more

objective review standard. *Pedrick v. Peoria & E. R. Co.*, 37 Ill. 2d 494, 229 N.E.2d 504 (1967). "[V]erdicts ought to be directed and judgments n.o.v. entered only in those cases in which all of the evidence, when viewed in the aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on the evidence could ever stand." *Pedrick*, 229 N.E.2d at 514. The Seventh Circuit followed the state standard while it continued to apply a federal reasonableness standard for new trial motions. *Mercado v. Ahmed & Checker Taxi Co.*, 974 F.2d 863, 866 (7th Cir. 1992); *Cook v. Hoppin*, 783 F.2d 684, 687-88 (7th Cir. 1986); *Huff v. White Motor Corp.*, 609 F.2d 286, 295 (7th Cir. 1979); *Galard v. Johnson*, 504 F.2d 1198, 1200 n.1 (7th Cir. 1974).

In *Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963 (7th Cir. 1983), Judge Posner, while affirming a state standard jury sufficiency rule, stated that the Court was "in some tension" because of the dichotomy between this standard and the new trial standard. He stated that the decision "nevertheless can be defended and maybe even reconciled" while noting that past opinions tended to ignore contrary law and criticism. *Id.* at 971. Several cases noted a possible conflict between the similar review contexts but still deferred to a state jury test, finding no need to resolve any inconsistency within the circuit or to reconsider the issue. *Robison v. Lescrenier*, 721 F.2d 1101, 1103 (7th Cir. 1983); *Davlan v. Otis Elevator Co.*, 816 F.2d 287, 289 (7th Cir. 1987) (contrasting state sufficiency test and federal new trial test); *Wassell v. Adams*, 865 F.2d 849, 854 (7th Cir. 1989).

Over the next decade, the Seventh Circuit continued to apply the state test rule without discussion of intervening decisions of this Court which arguably impact the standard of review analysis in diversity actions. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Nor did later cases attempt to reconcile these standards. *Allison v. Ticor Title Ins. Co.*, 979 F.2d 1187, 1196 (7th Cir. 1992) (separate section applies the federal new trial test without relating to opinion's long discussion of state sufficiency test); *Ross v. Black & Decker, Inc.*, 977 F.2d 1178, 1181-82 (7th Cir. 1992) (both reviews stated consecutively without noting possible inconsistency). And this was the case even though the use of the state test may have been determinative in a diversity action borrowing state law from a jurisdiction which applies the *scintilla* rule. *Allison v. Ticor Title Ins. Co.*, 979 F.2d 1187, 1193-96 (7th Cir. 1992) (applying Wisconsin *any evidence* standard; limited review test appears decisive).

All of this changed in 1994 when the Seventh Circuit adopted a federal standard of review.

> "[A]lthough state law defines the elements of a claim and the burden of persuasion, federal law defines the standard for evaluating the sufficiency of evidence. If reasonable persons could not find that the evidence justifies a decision for a party on each essential element, the court should grant judgment as a matter of law. . . ." *Mayer v. Gary Partners and Co., Ltd.*, 29 F.3d 330, 335 (7th Cir. 1994).

In the *Mayer* opinion by Judge Easterbrook, a panel of the 7th Circuit abandoned the state rule in favor of a uniform federal reasonableness test to apply to all phases of jury review. The Court decided that consistency with other appellate review situations and the *Erie* policy required this change. *Id.* at 333-351. See, also, *Sokol Crystal Prods. v. DSC Communications,* 15 F.3d 1427, 1431-32 (7th Cir. 1994).

Following *Mayer,* the Seventh Circuit has generally followed a federal sufficiency test for jury review. *Gruca v. Alpha Therapeutic Corp.,* 51 F.3d 638, 642 (7th Cir. 1995); *Desnick v. ABC, Inc.,* 44 F.3d 1345, 1349 (7th Cir. 1995). And yet even now the Seventh Circuit still occasionally follows the state review standard. *Jackson v. Bunge Corp.,* 40 F.3d 239, 242 (7th Cir. 1994); *Suzek v. Sea-Land Corp.,* 89 F.3d 345 (7th Cir. 1996); *Geldermann, Inc. v. Financial Management Consultants, Inc.,* 27 F.3d 307 (7th Cir. 1994); *Hiatt v. Rockwell International,* 26 F.3d 761 (7th Cir. 1994). Without further guidance from this Court, the circuit courts have apparently decided to make this decision on their own. See, *Boeing Co. v. Shipman,* 411 F.2d 365 (5th Cir. 1969) (*en banc*). While this may answer the question for a time, it does not provide the constitutional certainty that should be present on a fundamental issue of trial and appellate review.

SUMMARY

The sufficiency of the evidence test is not substantive in one case and procedural in another. In diversity cases where federal interests are not implicated, a state standard should apply in order to fully implement the state substantive law. Professor Childress has recently stated that "*any minority panel* otherwise now skeptical of a state standard rule need not await further high court direction to the extent these circuits wish to change or cement their review rule in favor of federal law." Steven A. Childress, *Review of Jury Verdicts in Diversity Cases: An Erie Update*, 4 Nat'l Italian Am. Bar Ass'n J. 39, 61 (1996) (emphasis added). Appellants disagree. For the above reasons and those stated in their Petition, Appellants ask this Court to grant a Writ of Certiorari to review this important constitutional question.

Respectfully submitted,

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